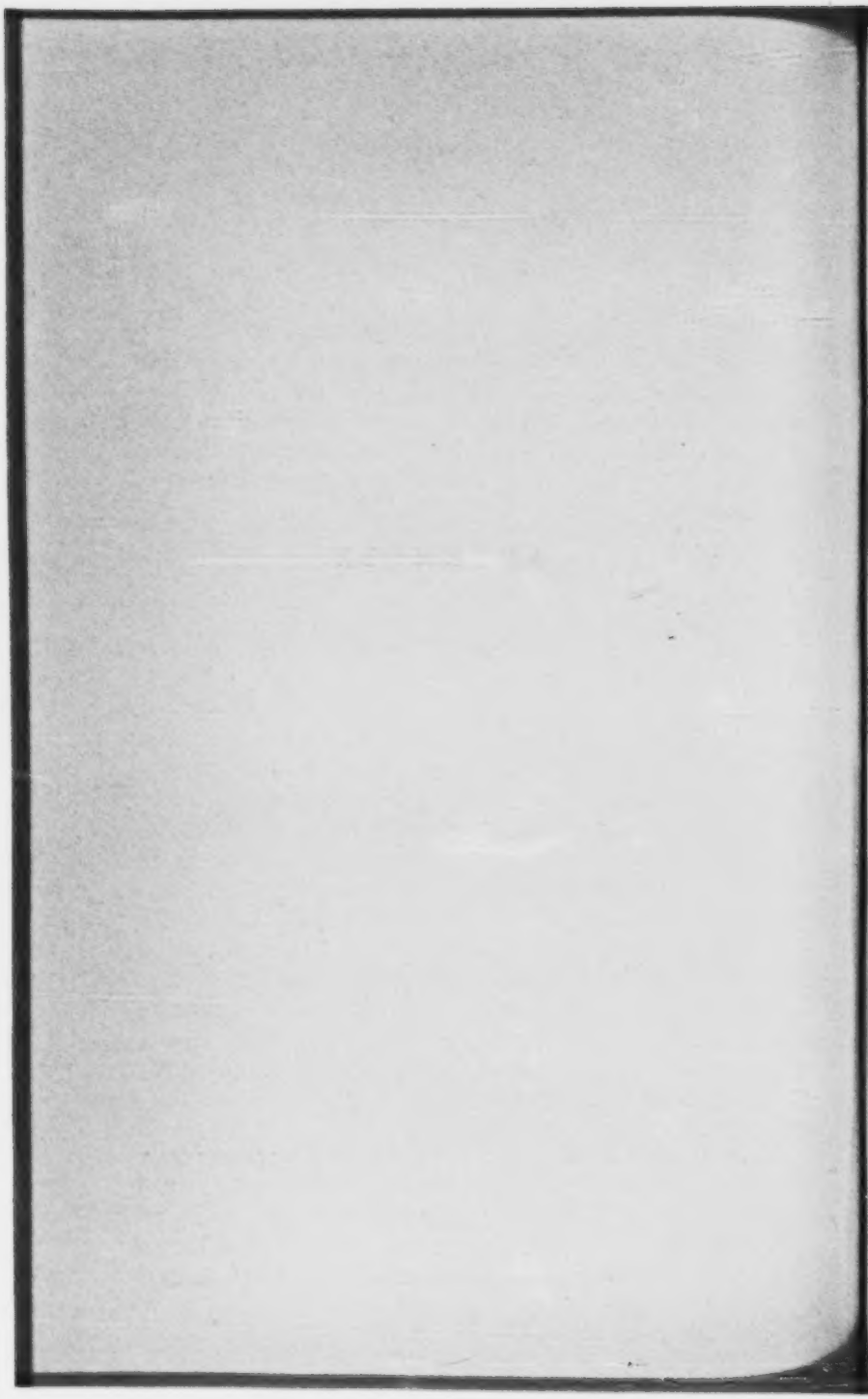

APPENDIX

Statutes Involved

28 U. S. C. 1491

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

ACT OF MARCH 9, 1920

41 Stat. 525, 46 U. S. C. 741, 742

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against

the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . .

MERCHANT SHIP SALES ACT OF 1946

60 Stat. 43, 50 U. S. C. App. 1738

CHARTER OF WAR-BUILT VESSELS TO CITIZENS

SEC. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3 (c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having pasenger accommoda-

tions for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

(d) Where an operator is engaged both in the foreign trade and in the domestic trade (coastwise or intercoastal), additional charter hire determined with reference to voyage profits of the chartered vessels, under regulations promulgated by the Maritime Commission, shall be computed, accounted for, and paid separately on such foreign trade and shall be computed, accounted for, and paid separately on such domestic trade, covering all voyages commencing subsequent to June 30, 1947.[1]

MERCHANT MARINE ACT, 1936

49 Stat. 2010, 46 U. S. C. 1199

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such

[1] Subsection (d) was added by the Act of June 28, 1947, 61 Stat. 190.

chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided,* That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

(b) Every charter shall contain a definition of the terms "net voyage profit" and "fair and reasonable overhead expenses", and "capital necessarily employed", as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expense and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter.

Orders and Opinions Below

IN THE

UNITED STATES COURT OF CLAIMS

242-55 MARINE TRANSPORT LINES, INC., and MARINE NAVIGATION COMPANY, INC.

262-55 PACIFIC FAR EAST LINE, INC.

314-55 BLACK DIAMOND STEAMSHIP CORP.

v.

THE UNITED STATES

Order

It appearing to the court that on June 11, 1956, the Supreme Court in the case of *Sword Line, Inc.* v. *United States,* No. 861, October 1955 Term, decided that causes of action of the nature stated in the petitions in these cases were of a maritime nature and, hence, that the courts of admiralty had juridsiction thereof,

IT IS ORDERED this twelfth day of July, 1956, that the former decisions rendered on March 6, 1956, which overruled defendant's motions to dismiss or for summary judgment are set aside and the petitions are now dismissed for the lack of jurisdiction, all as more fully set forth in the opinion rendered this day in the case of *Smith-Johnson Steamship Corp.* v. *United States,* No. 98-55.

By the Court,

BENJAMIN H. LITTLETON,
Acting Chief Judge.

Orders and Opinions Below

IN THE UNITED STATES COURT OF CLAIMS

No. 98-55

(Decided July 12, 1956)

SMITH-JOHNSON STEAMSHIP CORP.

v.

THE UNITED STATES

Mr. ARTHUR M. BECKER for plaintiff. Messrs. MELVIN SPAETH, GERALD B. GREENWALD and BECKER & MAGUIRE were on the brief.

Mr. LEAVENWORTH COLBY, with whom was Mr. Assistant Attorney General GEORGE COCHRAN DOUB, for defendant.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

PER CURIAM: In our opinion in this case rendered March 6, 1956, which was before us at that time on plaintiff's motion to strike defendant's special defense, we granted that motion, holding that plaintiff's petition was based on a statute and did not arise out of the maritime contract between the United States and plaintiff. Hence, we said the courts of admiralty did not have jurisdiction of such a case and that this court did.

The Second Circuit Court of Appeals had held in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, that the suit was on the contract, and since the contract was for the charter of a ship, it was maritime in nature, and, therefore, the

admiralty courts had jurisdiction. Certiorari was granted in that case, and the Second Circuit was affirmed by the Supreme Court in a *per curiam* opinion, which reads:

> *Per curiam:* Certiorari is granted limited to the question whether admiralty had jurisdiction over the controversy stated in the libel and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a maritime contract. *Archawski* v. *Hanioti,* 350 U. S. 532. Affirmed.

Since it is now settled that such causes of action are maritime causes of action and that, consequently, courts of admiralty have jurisdiction of them, this court does not have jurisdiction, because it is settled that the Suits in Admiralty Act, vesting jurisdiction in the district courts, "furnishes the exclusive remedy in admiralty against the United States and such corporations on maritime causes of action arising out of the possession and operation of merchant vessels." *Johnson* v. *Fleet Corp.*, 280 U. S. 320.

Plaintiff, Smith-Johnson Steamship Corporation, in its memorandum brief filed pursuant to the Court's order of June 14, 1956, says this case was overruled by the Supreme Court in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, 578.

In the opinion in *Johnson* v. *Fleet Corporation, supra,* the court dealt with four cases, of which *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten* was one. In the *Lustgarten* case, an action at law for damages for personal injuries was brought in the United States District Court against the Fleet Corporation and the Navigation Company. The Navigation Company was a private corporation operating a vessel owned by the United States as the agent of the United States. Defendant's answer alleged that "plaintiff's remedy is provided exclusively by the Suits in Admiralty Act," and, since his

action was brought on the law side of the court, rather than the admiralty side, the suit should be dismissed.

The Supreme Court held that courts of admiralty had exclusive jurisdiction and, hence, it remanded the case with directions to the District Court to dismiss it.

In *Brady* v. *Roosevelt Steamship Company, supra,* the Supreme Court said it was erroneous to have dismissed the case as against the private company operating the ship as agent for the United States; but it reaffirmed its former action in dismissing it as to the *Fleet Corporation.* It said:

> There is ample support for the holding in the *Johnson* case that section 2 of the Suits in Admiralty Act was intended to provide the only available remedy against the United States or its wholly owned corporations for enforcement of maritime causes of action covered by the Act. • • •

Therefore, instead of impairing the authority of *Johnson* v. *Fleet Corporation, supra,* so far as the question now before us is concerned, *Brady* v. *Roosevelt Steamship Co., supra,* upholds it and reaffirms the exclusive jurisdiction of courts of admiralty "for the enforcement of maritime causes of action covered by the Act."

In *Sword Line, Inc.* v. *United States, supra,* the Supreme Court has said this action was a maritime one and was covered by the Act. Hence, we have no alternative other than to deny plaintiff's motion for summary judgment and to grant defendant's motion to dismiss plaintiff's petition for lack of jurisdiction.

It is so ordered.

Earlier Orders and Opinions Below

March 6, 1956

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1956)

No. 98-55

SMITH-JOHNSON STEAMSHIP CORP., v. THE UNITED STATES

No. 262-55

PACIFIC FAR EAST LINE, INC., v. THE UNITED STATES

No. 314-55

BLACK DIAMOND STEAMSHIP CORP., v. THE UNITED STATES

Mr. ARTHUR M. BECKER for plaintiff in case No. 98-55; Messrs. MELVIN SPAETH, GERALD B. GREENWALD, and BECKER & MAGUIRE were on the briefs. Mr. J. FRANKLIN FORT for plaintiff in case No. 262-55; Messrs. RADNER, ZITO, KOMINERS & FORT, and ISRAEL CONVISSER were on the briefs. Mr. GEORGE F. GALLAND for plaintiff in case No. 314-55; Messrs. WILLIAM J. LIPPMAN, ROBERT N. KHARASCH, and GALLAND & KHARASCH were on the briefs.

Mr. LEAVENWORTH COLBY, with whom was Mr. Assistant Attorney General WARREN E. BURGER, for defendant.

ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S SPECIAL DEFENSE IN CASE NO. 98-55, AND ON DEFENDANT'S MOTIONS TO DISMISS IN CASES NOS. 262-55 AND 314-55.

Earlier Orders and Opinions Below

OPINION

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff alleges in the *Smith-Johnson Steamship Corporation* case that the defendant exacted from it for the hire of certain vessels more than was authorized by the Merchant Ship Sales Act of 1946 (60 Stat. 41), 50 U. S. C. App. 1735, et seq., and the Merchant Marine Act of 1936 (49 Stat. 1985), 46 U. S. C. 1101, et seq. It sues for the excess. Defendant in its answer sets up the special defense that this court lacks jurisdiction of the subject matter, because, it says, plaintiff's cause of action is on the contract for the hire of the vessels and is, therefore, maritime in nature, of which actions the admiralty courts have exclusive jurisdiction. Plaintiff says its action is on the statute and it moves to strike defendant's special defense.

The Merchant Ship Sales Act of 1946 provided for the charter of war-built vessels. Section 5 (b) authorized the United States Maritime Commission to fix the charter hire for vessels at such rates as the Commission should determine to be consistent with the policy of the Act. Plaintiff says that, in fixing the charter hire for the vessels chartered to it, the Commission went contrary to the policy of the Act in that it exacted from it a stated hire and in addition percentages of its profits on the voyages of the vessels in excess of the percentages authorized by the Act.

Section 5 (c) of the Act incorporated section 709 (a) of the Merchant Marine Act of 1936 (49 Stat. 1985, 2010) which provided:

> Every charter made by the Commission * * * shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed

10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The charter agreement tendered plaintiff by the Maritime Commission provided for a basic charter hire and also for additional charter hire as follows:

Clause 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of the vessels (all as hereinafter defined), the charterer shall pay over to the owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of

$100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 "WARSHIPDEMISEOUT" charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Plaintiff says this charter agreement exacted a percentage of its profits in excess of that authorized by law. Nevertheless, the charter agreement was executed and eight vessels were delivered to plaintiff. While the charter agreement was in effect plaintiff made preliminary payments of additional charter hire to defendant, pursuant to clause 13 of the agreement, quoted above, totalling the sum of $613,395.32. By final audit completed on February 4, 1955, defendant determined that, at the time of the audit, a total of $616,063.04 had accrued to defendant as additional charter hire under the charter agreement, which was paid on demand. Plaintiff seeks to recover $231,773.81 of the amount paid defendant as additional charter hire, on the ground that the contract exacted this much more than was authorized by law.

The issue presented is whether plaintiff's claim is on the contract, and, therefore, maritime in nature, of which the district courts have exclusive jurisdiction, or is a claim based on the statute, of which this court is given jurisdiction by section 1491 of Title 28 U. S. C.

Defendant says the action is maritime under both the Public Vessels Act and the Suits in Admiralty Act. The Public Vessels Act is not applicable because the vessels involved herein are not public vessels; only the Suits in Admiralty Act is pertinent. This Act confers exclusive jurisdiction on the district courts only in situations where, if the vessels were privately owned, a proceeding in admiralty could be maintained. *D. C. Andrews & Co.*, v. *United States*, 129 C. Cls. 574. If plaintiff were basing its claim on the charter agreement, the action would clearly be maritime in nature and maintainable in admiralty; but plaintiff does not base its claim on the charter agreement, but on the ground that the agreement exacted more than could lawfully be exacted. The contract has been performed according to its terms. No cause of action on the contract exists. Plaintiff's claim can only be grounded on the fact that the contract required more than the law authorized. Hence, its action is based on the statute, and this court, therefore, has jurisdiction.

Defendant relies upon *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, but in this case, plaintiff's claim was based on the contract, and not on the ground that the contract had exacted more than the law allowed. Plaintiff alleged that it had paid more for the carriage of freight than was due under the contract and sought to recover the amount of the overpayment. Admiralty had jurisdiction because the suit was on a maritime contract. The case is not in point on the question before us.

In *Archawski* v. *Hanioti*, 223 F. 2d 406, the Court of Appeals for the Second Circuit said that an action by prospective passengers to recover money paid for passage on a vessel that never sailed was a common law action of

indebitatus assumpsit, of which the admiralty courts had no jurisdiction. The Supreme Court granted certiorari, and it may be it will hold that the action was for a breach of a maritime contract, of which the admiralty courts have jurisdiction; but, even so, such a decision could not affect the decision of this case, since we think this is a suit based not on a contract, either maritime or at common law, but on a statute.

The Second Circuit, in an opinion by a pre-eminent jurist, decided *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, in which it took a view contrary to what we have expressed. It said in effect that the parties are presumed to have agreed on a hire for the vessels no greater than the law allowed and, hence, that the suit for excessive exaction was a suit on the contract, of which the courts of admiralty have jurisdiction. But no such presumption can be indulged in the case at bar, because it is contrary to the facts. The parties in fact did agree on a hire greater than the law allowed—taking the allegations of the petition to be true.

If the Government is not entitled to retain the excess, it is not because plaintiff did not agree to pay it, but because the statute did not authorize the exaction of so much. If plaintiff is entitled to recover, it is because its rights under the statute have been violated, not its rights under the contract.

For the reasons stated, we conclude that the plaintiff's cause of action is non-maritime in nature, and is one which could not be maintained in a court of admiralty. Accordingly, the claim falls within the jurisdiction of this court, and plaintiff's motion to strike defendant's special defense of want of jurisdiction is granted.

Defendant, in cases Nos. 262-55 and 314-55, has moved the court to dismiss for lack of jurisdiction. Relative to the question of jurisdiction, the causes of action asserted in the petitions of the respective plaintiffs in these cases are identical to the cause of action asserted in *Smith-Johnson Steamship Corporation* v. *United States*, No. 98-55. For

reasons stated above, we hold that this court has jurisdiction over the subject matter of these causes of action. Therefore, defendant's motions to dismiss for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

IN THE UNITED STATES COURT OF CLAIMS

No. 242-55

(Decided March 6, 1956)

MARINE TRANSPORT LINES, INC., AND MARINE NAVIGATION COMPANY, INC., v. THE UNITED STATES

Mr. J. FRANKLIN FORT for plaintiffs. Messrs. RADNER, ZITO, KOMINERS & FORT and ISRAEL CONVISSER were on the brief.

Mr. LEAVENWORTH COLBY, with whom was Mr. Assistant Attorney General WARREN E. BURGER, for defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

OPINION

WHITAKER, Judge, delivered the opinion of the court:

This case involves claims arising out of the lease of certain vessels by the defendant to plaintiffs under the Merchant Ship Sales Act of 1946, 60 Stat. 41; 50 U. S. C. A.

App. 1735 *et seq.* The case is before the court on defendant's motion for summary judgment, based on lack of jurisdiction in this court.

Plaintiffs' petition asserts four causes of action. The first of these is identical with the cause of action asserted in the case of *Smith-Johnson Steamship Corp.* v. *The United States,* No. 98-55, *et al.,* this day decided. For reasons therein stated it is our opinion that this court has jurisdiction over the subject matter of plaintiffs' first cause of action.

Plaintiffs' second count alleges that there were latent defects in many of the vessels delivered to them by the defendant and that these defects caused plaintiffs to be put to the expense of making repairs. It further asserts that the Maritime Commission ruled that these expenses were chargeable to the voyage accounts as routine operating expenses, whereas, under the Commission's own regulations the full amount of the expenses should have been refunded or credited to them, and not charged as a part of the voyage expenses in determining the profits from the voyage.

Plaintiffs' third count alleges that the Commission, contrary to its own regulations, did not allow plaintiffs full credit for consumable stores aboard the vessels at the time of redelivery, because it used a price list based on prices as of 1946 or earlier, whereas the regulations provided that the pricing should be computed as of the date of redelivery, at which time prices were higher than in 1946.

Plaintiffs' fourth and final count is a claim for expenses allegedly incurred in maintaining one of the vessels between the time plaintiffs sought to redeliver it and the time the Commission accepted redelivery, contrary to an earlier understanding between the parties that redelivery would be accepted when offered.

Plaintiffs contend that since their second and third causes of action are founded upon a regulation of an executive department, they are non-maritime in nature and thus within the jurisdiction of this court. The fourth cause

of action is based solely upon the defendants alleged violation of an understanding between the parties that it would accept redelivery of a certain one of the vessels when offered.

Defendant says that all of plaintiffs' claims are maritime in nature and thus beyond the jurisdiction of this court. It says that at least a part of them are based upon the contract and are thus maritime in nature.

It is unnecessary to decide whether or not the last three causes of action are maritime in nature, because they are clearly subsidiary to the main cause of action, stated in the first count of the petition, over which we have held we have jurisdiction. The second, third and fourth counts are so interrelated with the principal cause of action that as a practical matter the court taking jurisdiction of the first cause of action must necessarily decide the other three. If it is held that plaintiffs are entitled to recover on the first count, the amount due them cannot be determined without considering the other counts.

To illustrate: Plaintiffs are due to pay defendant a certain percentage of their profits on the voyages above 10 per cent of their invested capital. We must therefore, determine what those profits were. In doing so, it would be necessary to decide whether or not the cost of making repairs should be a deduction from the gross profit. This is the basis of plaintiffs' second cause of action. So, with the consumable stores and standby expenses incurred before the defendant accepted redelivery.

All four causes of action arise out of the same transaction, and, hence, the court taking jurisdiction of the main cause of action should decide them all.

For the reasons stated, it is our conclusion that this court has jurisdiction over the subject matter of all the counts set out in plaintiffs' petition. Therefore, defendant's motion for summary judgment for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

#382

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DICHMAN, WRIGHT & PUGH, INC.
Libelant

against

UNITED STATES OF AMERICA
Respondent

A. 182-397

Appearances:

HILL, BETTS & NASH, Esqs.,
120 Broadway
New York 38, New York

KOMINERS & FORT, Esqs.,
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Washington 5, D. C.
Proctors for Libelant

J. FRANKLIN FORT, Esq.,
EDWIN LONGCOPE, Esq.,
JOHN CUNNINGHAM, Esq.,
ISRAEL CONVISSER, Esq.,
Of Counsel.

Honorable PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Foley Square, New York 7, N. Y.

LEAVENWORTH COLBY, Esq.,
Chief, Admiralty & Shipping Section
Department of Justice,

BENJAMIN H. BERMAN, Esq.,
Attorney in Charge, New York Office
Admiralty & Shipping Section
Department of Justice.
Of Counsel.

Opinion.

DIMOCK, D. J.

This is a suit in admiralty to recover amounts of charter hire which libelant claims to have overpaid. Three "causes of action" are set forth in the libel but the first and third have been held to be time barred. Respondent, United States, the shipowner, excepts to the second on the ground of insufficiency.

Libelant seeks to recover amounts paid, under a sliding scale of "additional charter hire" set forth in the charter party, insofar as they exceed 50% of so much of its profits as exceed 10% on the capital employed in the operation of the ships. It cites in support of its claim section 709(a) of the Merchant Marine Act of 1936, as amended, 49 Stat. 1985, 46 U. S. 1101 et seq., which is copied in the margin.[1]

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[1] "Sec. 709 (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years."

The sliding scale in the charter party, in clause 13, copied in the margin,[2] begins by providing for payment to respondent of 50% of the profits over 10%, just as does section 709(a), but the charter party maintains that rate only so long as the profits do not exceed $100 per day. Insofar as they do exceed $100 per day, and do not exceed $300 per day, the charter party, unlike section 709(a), goes on to

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[2] "CLAUSE 13. *Additional Charter Hire.* If at the end of the calendar year 1950, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentage of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.
>
> Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire at such times and in such manner and amounts as may be required by the Owner; provided however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

provide for payment of 75% and, insofar as they exceed $300 per day, 90%.

Libelant contends that the 50% rate fixed by section 709(a) is a limitation. Respondent contends that it is a mere minimum. For the reasons hereinafter stated, I hold that it is a limitation and that libelant is entitled to the return of the excess paid on the face of the libel.

Section 709(a), by its terms, contemplates two types of payment to the shipowner: "the charter hire reserved in the charter" and "additional charter hire". The "additional charter hire" is 50% of so much of the profits "(after payment of the charter hire reserved in the charter * * *)" as exceeds 10% on the capital employed. Thus the "charter hire reserved in the charter" is a factor in the computation of the "additional charter hire".

The obvious purpose of the statutory requirement that charters shall contain a provision for the payment of this "additional charter hire" is to cut down the excessive profits payable in case the "charter hire reserved in the charter" has been fixed too low.

At the time of the adoption of section 709(a), it was clear that the share of the excess profits destined for the owner was 50% and that the Commission was powerless to raise or lower that share. By section 706(a) of the Act it was provided that the Commission should not "charter its vessels to private operators except upon competitive sealed bids" and section 707(a) contained the direction that the "Commission shall award the charter to the bidder proposing to pay the highest monthly charter hire". When the critical section 709(a) referred to "the charter hire reserved in the charter" it must have meant this "monthly charter hire" which constituted the basis of the bids. Thus the requirement in that section that the charter should contain a provision for "additional charter hire" of 50% of the excess profits was for the purpose of giving the owner a share of the windfall if the bid should prove to have been too low. In order to bid intelligently

the bidders had to know in advance what percentage of the total excess profits this share would be. The statute said 50%. Certainly the Commission by its fiat could not say "Bids will be on the assumption that the rate of recapture will be 75%" and even less could it, after a bid had been accepted, say "Your bid was on the assumption that the rate of recapture would be 50% but the charter party is going to provide that it will be 75%".

Since, therefore, section 709(a) at the time when it was adopted did not admit of any recapture rate in excess of 50%, the owner's position must be that its meaning was changed for the purposes of its application to the Merchant Ship Sales Act of 1946, 60 Stat. 41, 50 U. S. App. 1735 et seq.

Section 5(c) of that act made applicable to charters thereunder the critical section 709(a) of the Merchant Marine Act of 1936, copied in note 1 supra. The new act, in section 5(b) copied in the margin,[3] abandoned competitive bidding as a basis for fixing charter hire and provided that the charter hire must be fixed "at such rate as the Commission determines to be consistent with the policies of this Act". This section places two bottom limits on the Commission's scope, however. The rate shall not be less than 15% of the statutory sales price except upon the affirmative vote of at least four members of the Commission and, even then, shall not be less than the prevailing world market charter rates, except in the case of large passenger ships.

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[3] "Sec. 5(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.

Congress was not satisfied with the restrictions that the charter hire must be at a rate determined to be "consistent with the policies of this Act" and must not be less than 15% of the sales price in the absence of the affirmative vote of four commissioners and even then must not be less than the world market rate. It made applicable the old provision in section 709(a) of the Merchant Marine Act of 1936 so that, in the event of a windfall due to the generous determination or a change in traffic conditions, the charterer must share the excessive profits with the owner. According to the words of the statute the charterer and the owner are to share these excess profits fifty-fifty. In spite of the express direction: "[e]very charter * * * shall provide that * * * the charterer shall pay over * * * one-half" of such profit, and contrary to the clear intent of the statute when originally enacted, the respondent says that the charter need only provide that the charterer shall pay over an expressed fraction of such excess profit at least as large as one-half.

To substantiate such an expansion of the literal meaning of the statute and of its original intent, the owner invokes the power given to the Commission by section 5(b) to fix the charter hire rate. That power, however, was exhausted when the amount of the charter hire was fixed. That amount was fixed in dollars "at such rate as the Commission determines to be consistent with the policies of this Act." To say that the power to fix the charter hire carries over to the fixing of the rate of division of the excess profits under 709(a) would be to render the statutory scheme for two items of charter hire meaningless. The effect of the rule contended for by the owner is that the Commission could fix the rate of the owner's share of the excess profits at any figure not less than 50% so long as the net result would be that the sum of the "charter hire reserved in the charter" and the "additional charter hire" would produce "such rate as the Commission determines to be consistent with the policies of this Act". If the entire amount pay-

able under the charter party were indeed to be nothing but charter hire "at such rate as the Commission determines to be consistent with the policies of this Act", no intelligible purpose could be assigned to a statutory requirement that this amount be expressed in the charter party as the sum of an arbitrarily fixed "charter hire reserved in the charter" and an "additional charter hire" developed from the "charter hire reserved in the charter" among other factors.

The owner's contention is that the power to increase the owner's share of the excess profits above 50% in fixing the "additional charter hire" is necessary in order to make sure that the sum of the "charter hire reserved in the charter" and the "additional charter hire" shall equal "such rate as the Commission determines to be consistent with the policies of this Act". Since, under a correct interpretation of section 709(a), the "additional charter hire" forms no part of the rate determined by the Commission to be consistent with the policies of the Act, this argument for the power to fix the owner's share at more than 50% falls. Section 709(a) is clear in fixing it at 50% so I conclude that that share is a maximum as well as a minimum.

I see no reason why the Commission should not fix charter hire "at such rate as the Commission determines to be consistent with the policies of this Act" by inserting in the charter party a flat rate clause and a clause providing for payment on a sliding scale based on more than 50% of the excess profits. In doing so it would be fixing the "charter hire reserved in the charter" and it would be required by section 709(a) to insert in the charter another profit sharing clause in the statutory form to provide that any excess profits produced by the flat rate clause and the sliding scale clause would be "additional charter hire" and divided fifty-fifty. There is no allegation that that was done here, however.

It is asserted that Congress knew of the practice of computing charter hire on a sliding scale of profits. Be

that as it may, it is not asserted that Congress knew that a sliding scale clause was being used as a substitute for the 50% division clause required by section 709(a).

It is said that a charterer cannot be heard to complain that the owner has omitted a clause which would have required the charterer to pay additional charter hire. That might be true if it appeared that the Commission had formally determined that the sum of the two rates fixed by the flat rate clause and the sliding scale clause in the charter was the rate consistent with the policies of the Act and had inadvertently omitted the profit sharing clause required by section 709(a). Again, however, there is no allegation that that was done here. On the face of the libel I must assume that the owner intended to comply with the law and that the sliding scale profit sharing clause was inserted in attempted compliance with section 709(a). Indeed the owner says in its brief "The Commission's draftsmen in Clause 13 of the charter merely merged the mandatory 50 percent minimum of profit sharing into a discretionary sliding scale of profits, which the Commission had fixed under Section 5(b)".

The argument that libelant, having signed a charter party fixing the owner's share at more than the lawful 50%, cannot recover the excess has been answered in this Circuit in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, 346, aff'd 350 U. S. 532. There Judge Learned Hand said, p. 346:

> "The claim has for its premise that § 709 of the Merchant Marine Act of 1936 made illegal that portion of 'clause 13' of the charter that stipulated for the graduated scale of profit-sharing instead of for a division half and half, regardless of amount. It might be argued, if the libellant is right about § 709, that no contract was ever made, because the section made the libellant's promise unenforceable and there were therefore no mutual promises. On the other

> hand, if the statute did indeed limit the Commission to an even division of profits, it was the Commission's duty so to limit the libellant's promise; and we should not assume that the Commission would not have chartered the ships, unless it was to receive the unlawful hire. Obviously, we may impute to the libellant willingness to pay the lesser hire; so that it is proper to proceed as though there had been a contract for an even division, and nevertheless the Commission had compelled the libellant to pay more than the disputed hire."

The exception to the second "cause of action" is overruled.

Dated: September 29, 1956.

/s/ EDWARD J. DIMOCK,
United States District Judge.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff,
vs.
THE UNITED STATES OF AMERICA,
Defendant.

Civil No. 72-294

Appearances:

BURLINGHAM, HUPPER & KENNEDY, Attorneys for plaintiff, HERBERT M. LORD, of counsel.

PAUL W. WILLIAMS, U. S. Attorney, Attorney for defendant, BENJAMIN H. BERMAN, Attorney Dept. of Justice, of counsel.

RYAN, J.

In this suit at law plaintiff and defendant have moved for summary judgment; all material facts have been stipulated.

Plaintiff seeks recovery of $1839. damage to its barge sustained between March 3 and 7, 1947 and alleges jurisdiction under the Tucker Act (§1346(a)(2), 28 USCA). Defendant contends that plaintiff had available to it a remedy under the Suits in Admiralty Act (§741 et seq. 46 USCA) only and that the suit when filed on January 16, 1952 was time barred by the two-year limitation of the Act. If plaintiff may maintain this suit under the Tucker Act, the complaint is timely filed under the six-year limitation of that statute.

We must determine whether this court would have had jurisdiction under the Suits in Admiralty Act to entertain this claim had it been filed within the statutory period. If it would have, its jurisdiction under the Act was exclusive and the complaint must be dismissed as not timely brought. *Johnson* v. *Fleet Corporation*, 280 U. S. 320 (1930); *Prudential S.S. Corp.* v. *United States*, 220 F. 2d 655 (C. A. 2, 1955).

Plaintiff owner of the barge delivered it on March 3, 1947 to defendant with defendant's cargo aboard; upon redelivery of the barge after the cargo had been unloaded the barge was found to be in a damaged condition. Plaintiff repaired it and now, almost five years later, seeks to recover the damages it sustained as a result of the breach on the part of defendant of the contract of bailment. It is alleged that the damage to the barge occurred while it was in defendant's possession as bailee. No claim is made against the United States as owner of offending cargo and none against the vessel so that neither the cargo nor the vessel under the pleadings would have been under general maritime law subject to arrest. It is conceded by defendant that although the claim asserted arose from a maritime contract it did not give rise to a maritime lien, so as to support the filing of a libel in rem, but only to a direct, personal liability on the part of defendant.

The question then is: did the Suits in Admiralty Act, absent a liability enforceable by a libel in rem under general maritime law, intend to encompass a purely in personam liability and thereby provide the sole remedy in a case such as this?

Defendant urges that this question has been answered in the affirmative by *Johnson* v. *Fleet Corp., supra; Matson Navigation Co.* v. *United States*, 284 U. S. 352 and *Prudential Steamship Corp.* v. *United States, supra.*

By Section 1 of the Act vessels or cargo owned or possessed by the United States are immune from arrest and seizure in view of the provision of Section 2 which

permits the filing of a libel in personam against the United States in cases where if such vessel were privately owned or operated a proceeding in admiralty could be maintained.

Enactment of the Act followed the decision in the *Lake Monroe,* 250 U. S. 246 (1919), which held that under the Shipping Act of 1916 Government owned vessels while engaged in commercial activity were subject to seizure as if they were privately owned.

The purpose of the statute was to avoid the embarrassment of having Government vessels arrested and seized and of having its commercial operations interfered with (*Blamberg* v. *United States* (1923), 260 U. S. 452) and in lieu thereof to provide a remedy by a libel in personam and "a balancing consideration" for the immunity of the Government vessels and cargo from seizure under a libel in rem. *Prudential S. S. Corp.* v. *U. S., supra; Eastern Transport Co.* v. *United States,* 272 U. S. 675 (1927). In keeping with this purpose it is necessary to read the grant of waiver of immunity of Section 2 as coextensive with the immunity given by Section 1 and as compensation for such immunity and prohibition. *Calmar S. S. Corp.* v. *United States* (1953), 345 U. S. 446, 453 n. 6. That Section 2 is in pari materia with and subject to the limitations of Section 1 was made clear by the holding in *Blamberg* v. *United States, supra.* There in an action in which there was no personal liability alleged a libel in personam under the statute had been filed against the United States as owner of a vessel located in a foreign port. The Court dismissed the libel and held (1) that the Suits in Admiralty Act did not apply to vessels outside the United States, (2) that therefore the vessel obtained no immunity under Section 1 which had to be compensated for by a libel in personam under Section 2, and (3) that absent such immunity from seizure, the Act did not intend to grant an in personam jurisdiction where none otherwise existed. By the Court's decision the right to sue the United States in personam

under the statute was limited to those cases where a claim enforceable in rem existed which was taken away by the first section; however, where such right was present but was not taken away no grant of in personam jurisdiction was to be read into Section 2. See also, *Shewan* v. *United States*, 266 U. S. 108 (1924); *Nahmeh* v. *United*, 267 U. S. 122 (1925).

In 1927 the Supreme Court had occasion to define the scope of the jurisdiction granted by the second section of the Act. In *Eastern Transport Co.* v. *United States, supra*, a libel in personam against the United States as owner of a sunken wreck which had caused a collision and damage to plaintiff's vessel was filed. The claim sought to be enforced was one which would have given rise to a maritime lien and which would have been prosecuted by a proceeding in rem had the wrecked vessel survived. Since however there was no res upon which a recovery could be based, the libelant was obliged to rest upon the personal liability of the Government as owner and to prosecute his claim "in principle in personam as distinguished from an action in rem against the vessel wrecked." This the Court held he could do under the Act. It held that the phrase "a proceeding in admiralty" was broad enough to cover both a libel in personam and a libel in rem and that by reason of Section 3 the proceeding was not limited in its scope, purpose and incidents to that of "a suit in rem merely transmuted into the form of an action in personam." The Court further wrote:

> "In spite of the purpose of the Act to create a substitute for a suit *in rem*, however, we are forced to the view by the language used in §§3 and 6 that it must be construed to have a wider effect than that which its §1 would lead us to expect" (p. 689).

Section 3, it found, provided in a proper case a double remedy against the United States—a remedy really in

personam as the owner of the offending vessel, like any private owner, and a remedy in substance in rem against the vessel, but which under the Act took the form of a proceeding in personam and substituted the personal liability of the Government for that of the vessel which was declared immune.

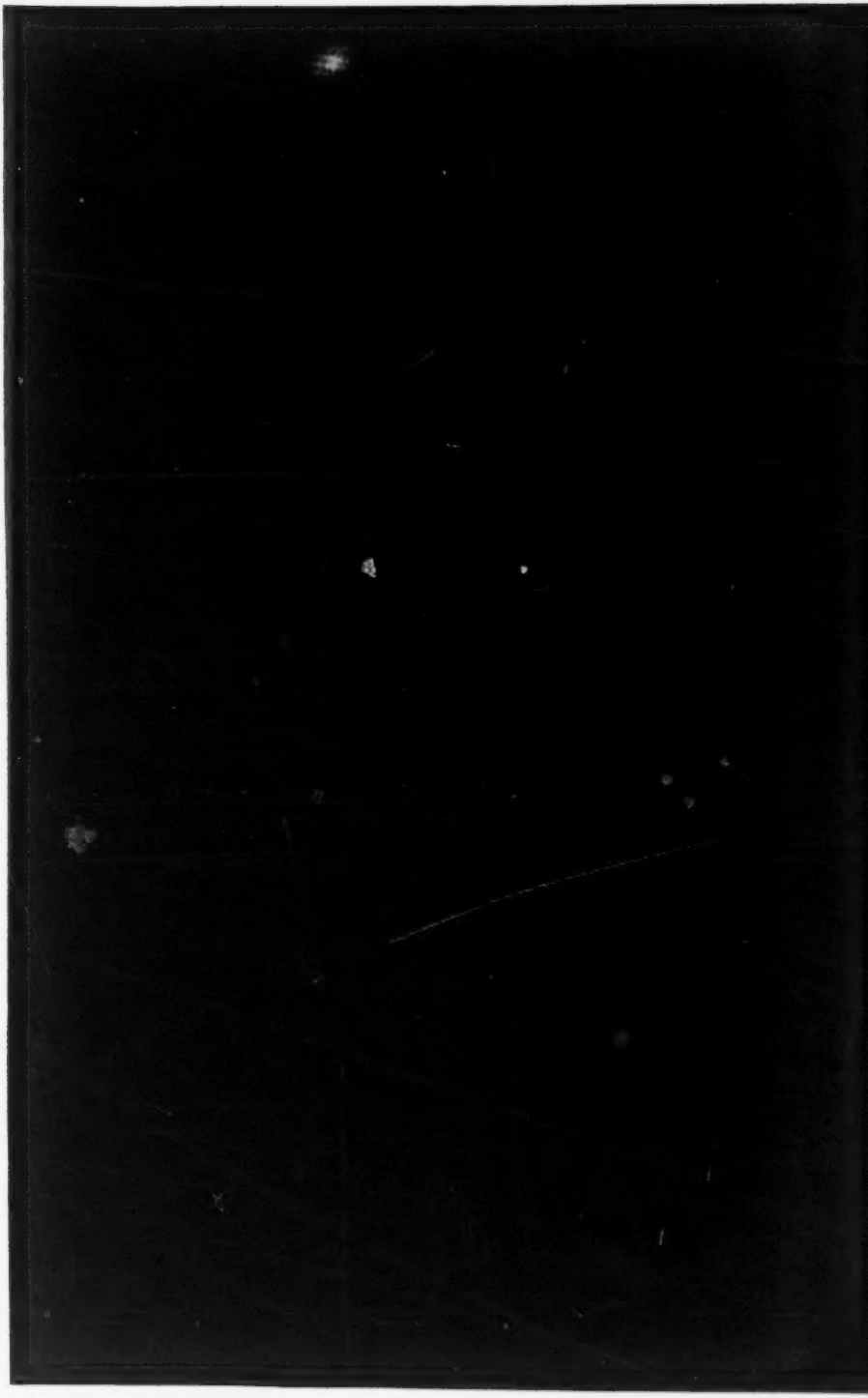
In *Fleet Corp.* v. *Rosenberg Bros.* (1924), 276 U. S. 202, decided the following year, this holding was reaffirmed. There a libel in personam was filed against the Government as owner of a vessel which had stranded and become a total loss resulting in the destruction of libelant's goods. Again the claim was one in which a recovery in rem might have been had except for the fact that the res had not survived. For the first time, too, the Court held that the Act under such circumstances provided the exclusive remedy in admiralty—although it refrained from passing on the availability of concurrent remedies in a court of law. In a later case, *Johnson* v. *Fleet, supra* (1930), the Court concluded "that the remedies given by the Act are exclusive in all cases where a libel might be filed under it."

The significant difference between the *Eastern Transport* and *Rosenberg* cases and the instant case is that there the claims pleaded were predicated on an in rem liability which would have subjected the vessels to seizure had they been in existence and privately owned, and permitted a recovery in rem, whereas here the claim pleads a purely personal liability which at no time could have permitted a remedy or recovery in rem. This distinction was recognized by Judge Kirkpatrick in *Burkholder* v. *United States*, 56 F. Supp. 106 (E. D. Penn. 1944) and by Judge Dimock in the memorandum filed in this case on June 14, 1955. *Prudential S. S. Company, Matson Navigation Co., supra*, and *Aliotti* v. *United States* (C. A. 9, 1955), 221 F. 2d 589 are not to the contrary, for in each of those cases the vessel or cargo in question could have been libeled.

Thus, it is essential to the filing of a libel under the Suits in Admiralty Act that the claim be of a nature enforcible by a proceeding in rem. No libel in rem could ever have been filed here; the court would have been without jurisdiction under the statute; plaintiff's only available remedy lay at law under the Tucker Act upon a contract (*C. F. Harms Co.* v. *Erie R. R.*, 167 F. 2d 562 (CA 2, 1948)); the suit was timely filed and judgment is awarded the plaintiff. Submit decree.

SYLVESTER J. RYAN,
U. S. D. J.

May 7, 1956



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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 494

MARINE TRANSPORT LINES, INC. AND MARINE NAVIGATION COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinions of the Court of Claims, dated March 6, 1956 (Pet. App. 9a-17a), are reported at 139 F. Supp. 298 and 301, respectively. The order of the Court of Claims, dated July 12, 1956, setting aside the rulings of March 6, 1956 (Pet. 5a), is not accompanied by a separate opinion. It refers, however, to the opinion rendered on the same day in *Smith-Johnson Steam-*

ship Corp. v. *United States* (Pet. App. 6a-8a), which is reported at 142 F. Supp. 367.

JURISDICTION

The order of the Court of Claims dismissing the complaints (Pet. 5a) was entered on July 12, 1956. The petition for writs of certiorari was filed on October 9, 1956. The jurisdiction of the Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction over a claim which is the subject of a pending libel in admiralty filed by the plaintiff in a federal district court.

2. Whether the exclusive jurisdiction of the admiralty courts under the Suits in Admiralty Act and Public Vessels Act for suits seeking a refund of charter hire is defeated by the circumstances that the complaint is couched in the form of an action for an accounting and refers to more than one vessel.

STATUTES INVOLVED

The Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, provides in pertinent part (46 U.S.C. 741, 742):

> Section 1. * * * That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by

judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Section 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * *

Section 1500 of the Judicial Code (28 U.S.C. 1500) provides as follows:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 942.)

STATEMENT

The instant petition relates to two companion cases to *Smith-Johnson Steamship Co.* v. *United States,* No. 353 this Term, certiorari denied November 5, 1956. As

in *Smith-Johnson*, the gist of petitioners' complaints is that they had chartered from the United States certain war-built vessels under the Merchant Ship Sales Act of 1946 and the Merchant Marine Act of 1936, and that they had been overcharged because the charter hire had been computed in violation of statutory directions. The complaint of the Marine Transport Lines alleges in addition that the vessels had latent defects, that the Government had not allowed it full credit for consumable stores at the time of redelivery, and that the Government had refused to take redelivery of one of the vessels when offered, thereby subjecting petitioner to additional expense (Pet. 15a-17a).

Both petitioners filed libels in admiralty [1] as well as complaints in the Court of Claims. In the Court of Claims, the Government moved to dismiss the complaints for lack of jurisdiction on the ground that their subject matter was under the exclusive jurisdiction of the admiralty courts under the Suits in Admiralty and Public Vessels Acts. In its decisions dated March 6, 1956 (Pet. 9a-15a, 15a-17a), the Court of Claims denied these motions.

On June 11, 1956, this Court announced its decision in *Sword Line* v. *United States*, 351 U.S. 976, involving a libel in admiralty also seeking the recovery of allegedly excessive charter hire collected in violation of the mandates of the Merchant Ship Sales and Merchant Marine Acts. The Court, relying on its recent decision

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[1] Petitioner Pacific Far East Line filed a libel in admiralty in the United States District Court for the Northern District of California on July 13, 1955, and an amended libel was filed on July 30, 1956. Petitioners Marine Transport Lines, Inc., et al., filed their libel in admiralty on June 18, 1956, in the United States District Court for the District of Delaware. Copies of the two libels have been filed with the Clerk.

in *Archawski* v. *Hanioti,* 350 U.S. 532, held that the "libel though dependent on a statute, alleges unjust enrichment from a marine contract" and that consequently admiralty had jurisdiction over it.

Thereafter the Court of Claims reconsidered its ruling of March 6, 1956, in the light of this Court's decision in *Sword Line,* and by order dated July 12, 1956 (Pet. 5a), granted the Government's motions to dismiss the complaints for lack of jurisdiction for the reasons set forth in its opinion of July 12, 1956, in *Smith-Johnson S.S. Corp.* v. *United States* (Pet. 6a-8a). In *Smith-Johnson,* the Court of Claims held, under the decision of this Court in *Sword Line,* that the similar claims there presented were cognizable under the Suits in Admiralty Act and that such remedy, being exclusive in nature, precluded any jurisdiction of the Court of Claims under the Tucker Act.

ARGUMENT

1. In addition to issues which are identical with those presented in *Smith-Johnson S.S. Co.* v. *United States,* No. 353, this Term, certiorari denied November 5, 1956, petitioners here seek to raise two additional arguments to support their claims that the Court of Claims has jurisdiction to pass on their complaints. The instant cases, however, contain a jurisdictional defect not presented in the *Smith-Johnson.* The filing by the petitioners of libels in admiralty peremptorily deprived the Court of Claims of jurisdiction by virtue of 28 U.S.C. 1500 (*supra,* p. 3).

As this Court pointed out recently in *Calmar S.S. Corp.* v. *United States,* 345 U.S. 446, 455, fn. 7, it is the very purpose of 28 U.S.C. 1500 to prevent hedging on the part of the litigant by the expedient of filing suits

both in the Court of Claims under the Tucker Act and in a district court under the Suits in Admiralty Act.[2]

The application of 28 U.S.C. 1500 is not defeated by the circumstance that petitioners did not file their libel in admiralty before or simultaneously with the filing of the action in the Court of Claims.[3] The policy underlying 28 U.S.C. 1500 cannot be circumvented so easily. This Court has held that the filing of a second complaint ousts whatever jurisdiction the Court of Claims might have had. Thus, a complaint filed even after dismissal in the Court of Claims is fatal to a review in this Court, *Corona Coal Company* v. *United States*, 263 U.S. 537, and it prevents a reopening of the case, *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, 95.[4] Here both libels were filed in the district courts prior to July 12, 1956, the date of the dismissals of the com-

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[2] *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355-356, provides no support to petitioners. In *Matson*, this Court held that Section 154 of the Judicial Code (28 U.S.C. (1946 Ed.) 260), the predecessor of 28 U.S.C. 1500, does not bar a suit against the United States in the Court of Claims where another suit against the United States has been filed in the district court because Section 154 referred only to suits filed against a person "acting * * * under the authority of the United States." The *Matson* decision is no longer applicable in view of the new statutory language of 28 U.S.C. 1500, expressly referring to suits against the United States in another court.

[3] In *Pacific Far East Lines, Inc.*, one of the two cases covered by the instant petition, the complaint in the Court of Claims was filed on June 17, 1955, and the original libel in admiralty on July 13, 1955. The corresponding dates in the other case, *Marine Transport Lines, Inc.*, are June 30, 1955, and June 18, 1956, respectively.

[4] While 28 U.S.C. 1500, in contrast with former Section 154 (28 U.S.C. (1946 Ed.) 260), does not in terms bar review in the Supreme Court, the Revisers' Note states that the "words 'or in the Supreme Court on appeal therefrom' were omitted as unnecessary". H. Rep. No. 308, 80th Cong., 1st Sess., p. A 140.

plaints in the Court of Claims.[5] Thus the Court of Claims, by virtue of 28 U.S.C. 1500, lost whatever jurisdiction it might have had over both complaints when the libels in admiralty were filed.[6]

2. In any event, even apart from 28 U.S.C. 1500, the Court of Claims lacks jurisdiction over these suits because their subject matter is within the exclusive jurisdiction of the admiralty courts. In this respect, petitioners concede that the two cases covered by the instant petition are largely identical with *Smith-Johnson S.S. Co.* v. *United States,* No. 353 this term, certiorari denied November 5, 1956; indeed, they rest on the argument made by petitioner in that case (Pet. 6). We shall follow their example and refer to our brief in opposition in No. 353 in order to avoid any unnecessary duplication.

Petitioners seek to distinguish their case from *Smith-Johnson,* however, by claiming that their suit is not actually one for the repayment of excessive charter hire but instead one for an accounting, and that, in addition, it refers to a number of vessels so that there is no identifiable res to which a maritime lien could attach.

a. The first contention, *viz.,* that the complaint is one for an accounting, is merely an elaboration of the argument presented without success in *American Eastern Corporation* v. *United States,* No. 934, October Term, 1955, certiorari denied, 351 U.S. 983. It is plainly without merit for, even if the form of the action be one

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[5] See notes 1 and 3, *supra.*

[6] See also *United States Lines* v. *United States,* No. 503, October Term, 1954, certiorari denied, 348 U.S. 942, in which the petition for a writ of certiorari was opposed exclusively on the ground that petitioner had filed a libel in admiralty after having commenced an action in the Court of Claims.

for an accounting, its substance is for the return of improperly collected charter hire and "[a]dmiralty is not concerned with the form of the action, but with its substance." *Krauss Bros. Co.* v. *Dimon S.S. Corp.*, 290 U.S. 117, 124; *Archawski* v. *Hanioti*, 350 U.S. 532, 533-534; see also *Sword Line* v. *United States*, 230 F. 2d 75, 76-77 (C.A. 2), aff'd, 351 U.S. 976. Just as a libel in rem lies for the collection of charter hire, so a suit for the refund of such charter hire is cognizable in admiralty. *Krauss Bros. Co.* v. *Dimon S.S. Co.*, 290 U.S. 117. Nor do the admiralty courts lack the machinery to conduct an accounting; Admiralty Rules 43 and 43½ expressly provide for the reference of suitable cases to commissioners or assessors.

b. The circumstance that petitioners chartered more than one vessel does not destroy the jurisdiction of the admiralty courts. *Sword Line* involved the charter of forty-four vessels; there too, the compensation was based upon the "cumulative net voyage profits."[7] Proper auditing methods certainly can allocate the amount of overcharge, if any, to any specific vessel if this should be found necessary. The way petitioners keep their books cannot affect the jurisdiction of the courts. If the district court decisions cited by petitioners (Pet. 11-17) contain any statements to the contrary, they are overruled by the directly applicable decision of this Court in *Sword Line* v. *United States*, 351 U.S. 976.

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[7] *Sword Line* v. *United States*, 228 F. 2d 344, 345 (C.A. 2). See also the petition for a writ of certiorari in *Sword Line*, No. 861, 1955 Term, pp. 4-5.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
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